

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Respondent,

2:00-cr-564-GEB-KJM-P

vs.

SANTOS AYON RIVAS,

Movant.

ORDER

_____/

Movant, a federal prisoner proceeding pro se, has filed a motion under Fed. R. Civ. P. 60(b)(1) for relief from the March 27, 2006 order denying his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255.

Movant filed his § 2255 motion on July 14, 2003, arguing that had trial counsel had thoroughly reviewed the presentence report, he would have realized movant's statement to the probation officer contradicted the factual basis for his guilty plea, which in turn would have alerted counsel to the fact that movant wished to withdraw his guilty plea. Movant's Mem. P. & A. in Supp. § 2255 Motion (Mem. P. & A.) at 2-3. He characterized this as a failure to comply with Federal Rule of Criminal Procedure 32.

In his declaration, movant also suggested his statement to the probation officer was an objection to the calculation of drug quantity based on his limited participation in the

1 offense and that trial counsel instructed him not to object to the drug quantity calculation despite
 2 his “expressed desire” to do so. Declaration of Santos Ayon Rivas (Rivas Decl.) ¶¶ 5-7. He
 3 claimed defense counsel failed to discuss the “available defenses in reference to determining the
 4 quantity of drugs attributable to my limited participation in the offense.” Id. ¶ 3. Finally, he
 5 contended he was unsure about the extent of his waiver of appeal because he did not know
 6 “whether or not the interpreter presented a truthful and accurate translation during the plea
 7 bargaining, change of plea, and sentencing hearings.” Id. ¶¶ 9-10.

8 On November 19, 2004, counsel filed a request to correct his sentence under
 9 Federal Rule of Criminal Procedure 35 on movant’s behalf.. Because the seven day period for
 10 correcting a sentence under the rule had expired, the Magistrate Judge construed this as a request
 11 to amend the § 2255 motion to add a challenge to the sentence under *Blakely v. Washington*, 542
 12 U.S. 296. (2004).

13 On January 13, 2006, the Magistrate Judge issued findings and recommendations,
 14 recommending that the motion to amend, correct or vacate the sentence be denied; the Magistrate
 15 Judge also denied counsel’s request to amend the § 2255 motion.

16 This court adopted the findings and recommendations on March 27, 2006 and
 17 ordered that the § 2255 be denied. Movant did not appeal this ruling. Instead, on May 12, 2006,
 18 he filed the instant motion, arguing that he is entitled to vacate the ruling on the grounds of
 19 “mistake, inadvertence, surprise, or excusable neglect” under rule 60(b)(1). Although the basis
 20 of the motion is not entirely clear, it appears that movant’s “mistake” is his “mistaken[] belief
 21 that his sentence was enhanced upon drug quantity,” when in fact the real problem with his
 22 sentence is that the government breached the plea agreement.

23 Under 28 U.S.C. § 2255, a movant cannot proceed with a second or successive
 24 motion unless he has obtained certification from a panel of the Court of Appeals that the motion
 25 meets at least one of the criteria in the statute. In *Gonzalez v. Crosby*, 545 U.S. 524, 125 S.Ct.
 26 2621 (2005), the Supreme Court considered the question whether a rule 60(b) motion filed in a

